

PDF hosted at the Radboud Repository of the Radboud University Nijmegen

The following full text is a publisher's version.

For additional information about this publication click this link.

<http://hdl.handle.net/2066/151672>

Please be advised that this information was generated on 2017-12-05 and may be subject to change.

(2015) 3 NIBLeJ 13

The Uneasy Case for Schemes of Arrangement under English Law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?

Lucas KORTMANN* and MICHAEL VEDER**

Introduction

1 We feel honoured to have been invited to contribute to this Festschrift for Ian Fletcher. We are delighted to have this opportunity to pay tribute to a man whose work in the field of international insolvency law has been so crucial to the development of this area of law. Ian Fletcher has been instrumental in the development of the theory and practice of international insolvency law, not only through his research but also as chair of INSOL International's Academics Group and as one of the founding fathers of and driving forces behind INSOL International's Global Insolvency Practice Course. Both of us have been involved in the INSOL Fellowship course. It is a unique programme that brings together academics and practitioners from all over the world. It furthers the development and exchange of knowledge in the field of international insolvency law and fosters friendships. On Ian Fletcher's instigation fellows and academics have also given joint presentations at the conferences of the Academics Group. This contribution is based on a presentation that we gave at one of those joint sessions on the use of English law schemes of arrangement to restructure debts of non-UK companies.

2 Over the last couple of years an increasing number of non-UK companies have sought the assistance of English law, in particular the scheme of arrangement under Part 26 of the Companies Act 2006, and the English courts to restructure their debts in order to avoid the opening of insolvency proceedings in their "home" jurisdiction. This development illustrates the increasing need in practice for debt restructuring mechanisms that do not involve the opening of insolvency proceedings proper but nevertheless enable a restructuring of indebtedness based upon a majority vote of the creditors concerned with a cram down of the dissenting

minority. The success of the scheme of arrangement under English law has prompted a number of European jurisdictions to introduce similar restructuring tools.¹ Also in the Netherlands a pre-draft of a bill was released in the fall of 2014 that seeks to introduce into Dutch law a pre-insolvency restructuring tool that is based on the English law scheme of arrangement and the US Chapter 11 reorganisation plan.² This development has also been picked up by the European Commission, which in its Recommendation on a new approach to business failure and insolvency of 12 March 2014³ has called upon the Member States to introduce such pre-insolvency restructuring mechanisms in order to ensure that debtors have access to a framework which allows them to restructure their business at an early stage with the objective of preventing insolvency.

3 The use of a scheme of arrangement in respect of non-UK debtors raises intriguing questions of jurisdiction and recognition. The scheme can, of course, only produce the desired effect if it is effective in those member states where the debtor company has assets. In the judgments sanctioning the schemes the English judges seriously examine and give account of the ground on which they assume jurisdiction. As English courts want to make sure that they only sanction schemes that will be effective, the courts also address the question whether the scheme will be recognised in other relevant jurisdictions. In doing so, they rely on expert advice from the relevant member states. In most cases the advice (apparently) is that a scheme will be recognised, albeit that the underlying reasoning may differ. In some cases it is argued that recognition is a procedural matter with a focus on the recognition of the judgment of the court sanctioning the scheme that is governed by Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), in other cases recognition is based on a more contractual approach and it is argued that the scheme of arrangement falls within the ambit of Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation").

4 In most cases, the question whether a scheme is recognised has not been brought before the courts of other member states. At the end of the day, apparently there were no dissenting creditors trying to take recourse against the debtor beyond the terms of the scheme. Interestingly though, in a case where the issue has been put to the highest court in another jurisdiction, recognition has been refused. On 15 February 2012, the German Bundesgerichtshof denied recognition of the scheme of

* Lucas Kortmann is partner at the Amsterdam based law firm RESOR N.V. and fellow of INSOL International.

** Michael Veder is professor of private law, in particular insolvency law, at the Business & Law Research Centre, Faculty of Law, Radboud University, and adviser at RESOR N.V.

¹ For example, Spain and Germany.

² Copy available at: <<http://www.internetconsultatie.nl/wco2>>.

³ C(2014) 1500 final, available at: <http://ec.europa.eu/justice/civil/files/c_2014_1500_en.pdf>.

arrangements in respect of the English insurance company Equitable Life.⁴ However, it must be said that the Scheme of Arrangement in respect of Equitable Life concerned a particular case as it concerned claims under insurance contracts (in respect of which specific exclusive jurisdiction clauses apply under the Brussels I Regulation) and also purported to affect claims under insurance contracts governed by German law.

5 This contribution looks at a number of aspects of the use of the English law scheme of arrangement in respect of non-UK companies. It examines the question whether the English courts are correct or should perhaps be more reluctant to assume jurisdiction to sanction schemes. In particular where the only relevant connection with the UK is that the credit facilities to which the scheme is intended to apply are governed by English law and contain a choice of forum clause identifying the UK courts as the proper forum for disputes arising in relation to the facilities, or, as it was the case in *Magyar Telecom*, the scheme company's centre of main interests was moved to the UK in view of the adoption of the scheme, the question arises whether assuming jurisdiction is justified. Furthermore, this contribution will briefly look at the recognition of such schemes in other Member States of the European Union.

6 This contribution is structured as follows. Chapter 2 contains a description of what a Scheme of Arrangement is and how it is put in place under English law. Chapter 3 discusses the grounds on which the English courts assume jurisdiction, also in the light of the EU regulations that are in place. Chapter 4 deals with the recognition of schemes of arrangement in other Member States and is followed by some concluding observations.

Schemes of Arrangement under the Companies Act 2006

7 A scheme of arrangement is an instrument that is available to companies under Part 26 of the Companies Act 2006 ("Arrangements and Reconstructions"). Pursuant to section 895(1) of the Companies Act 2006, a scheme can be between a company and its creditors, or any class of them, or between the company and its members, or any class of them. It can be used for a variety of purposes. A scheme can, for example, be used to effect a (de)merger, effect a take-over or effect a restructuring between a company in financial difficulties and its creditors. A scheme may also include a reorganization of the company's share capital.

8 The advantage of effecting a restructuring through a scheme is that, while generally an out-of-court work out requires unanimous consent of the affected creditors, once approved by the requisite majority of creditors and the court, the scheme binds all those who fall within its terms, including those who object and

⁴ BGH 15 February 2012, IV ZR 194/09, available at: <www.bundesgerichtshof.de>.

those who did not vote. A “cram down” of the minority in a scheme only becomes binding on all creditors (including dissenting and non-voting creditors) after the scrutiny of the court to ensure that there is no unfairness in the scheme.

9 The schemes sanctioned by the English courts in respect of non-UK companies were schemes that were proposed in order to avoid formal insolvency proceedings in the member state of the company’s centre of main interests (“COMI”). Schemes under Part 26 of the Companies Act 2006 may, however, also be proposed in the context of a formal insolvency proceeding.

10 A scheme of arrangement is put in place in three stages.

11 First, an application must be filed with the court for an order convening the necessary meeting(s) of the relevant members or creditors.⁵ The identification of the classes in respect of which separate meetings must be held and approval must be obtained is crucial. If the class meetings are improperly constituted, the court will refuse to sanction the scheme. The “golden thread” in respect of the composition of classes has been set forth by Mr Justice Hildyard in the *PrimaCom* judgment of 20 December 2011:

“The essential requirement is that the class should be comprised only of persons whose rights in terms of their existing and the rights offered in replacement, in each case as against the company, are sufficiently similar to enable them to properly consult and identify their true interests together.”⁶

12 Second, the meeting(s) of the relevant (classes of) creditors or members must be convened in which the proposed scheme will be voted on.

13 A majority in number representing 75% in value of the (class of) creditors or members, present and voting either in person or by proxy at the meeting must agree to the proposed scheme.⁷ Those who do not vote are not taken into account. All classes must consent to the scheme; there is no cram down of dissenting classes.

14 Third, once approved by the requisite majorities an application must be filed with the court to sanction the scheme. The sanctioning by the court of a scheme is not a formality. The court is not bound by the decision of the majority of the creditors voting at the meeting(s). The court has “unfettered”⁸ discretion whether to approve it, although in practice the courts are reluctant to interfere if a proper

⁵ With respect to the *PrimaCom* case, see [2011] EWHC 3746 (Ch).

⁶ *Ibid.*, at paragraph 44.

⁷ Section 899(1), Companies Act 2006.

⁸ J. Birds (ed), *Annotated Companies Legislation* (2010, Oxford University Press, Oxford), at paragraph 26.899.05.

majority has approved the scheme.⁹ In considering whether to sanction a scheme the court will take into account:

- (a) whether all relevant formalities have been complied with;
- (b) whether the meetings have been properly held and the majority acted bona fide in supporting the scheme; and
- (c) whether the scheme is such that an intelligent and honest person, who is a member of the class concerned and acting alone in respect of his interest as such a member, might reasonably approve it.¹⁰

15 A scheme that has been sanctioned by the court is binding on all creditors, including dissenting creditors and creditors that did not vote.

Jurisdiction to sanction a Scheme in respect of Non-UK Companies

Introduction

16 When the court is requested to sanction the scheme, it must establish that it has jurisdiction to sanction the scheme. In particular in an international context, the English court will want to ensure that a sanctioned scheme can be effectuated, not only in England, but also in other relevant jurisdictions. Therefore, when sanctioning a scheme of a non-UK company, courts approach the question on jurisdiction both from a domestic English law perspective and from an international (European) perspective.

Jurisdiction under English Law

17 Jurisdiction to sanction a scheme is found in section 895(2) of the Companies Act 2006 which provides that a scheme can be proposed by “any company liable to be wound up under the Insolvency Act 1986”. According to section 221 of the Insolvency Act 1986, a so-called “unregistered company” can be wound up under that Insolvency Act 1986. Pursuant to section 220 of the Insolvency Act 1986, an unregistered company includes any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom. One would assume that these provisions would be intended (only) to cover UK companies that are not registered in the United Kingdom. However, based on the literal wording of the Insolvency Act 1986, any foreign company that is not registered in the United Kingdom could be wound up under the Insolvency Act 1986. Consequently, any such foreign company would also fit the definition of

⁹ Ibid., at paragraph 26.899.05; B. Hannigan, *Company Law* (2nd ed) (2009, Oxford University Press, Oxford), at paragraph 26-119. For examples of situations where the court might refuse to sanction a scheme, see Birds, above note 8, at paragraph 26.899.06.

¹⁰ See Birds, above note 8, at paragraph 26.899.05; Hannigan, above note 9, at paragraphs 26-117 and 118; *Re PrimaCom* [2012] EWHC 164 (Ch), at paragraph 4.

“liable to be wound up”, as referred to in section 895(2) of the Companies Act 2006. Although one can question whether the legislator intended such a wide scope for the application of these rules, in practice this is why foreign companies were able to approach the English courts to sanction a scheme.

18 The English courts have developed conditions as to whether the court should use its discretionary power to wind up such a foreign company. Most importantly, it is considered that there must be a sufficient connection with England or Wales. The conditions required to establish jurisdiction so as to wind-up a foreign company were set out in *Real Estate Development Co* [1991] BCLC 174:

- (i) there must be a sufficiently close connection with England and Wales which may, but does not have to be, in the form of assets within the jurisdiction;
- (ii) there must be a reasonable possibility of benefit accruing to creditors from the making of a winding up order; and
- (iii) one or more persons interested in the distribution of assets must be persons over whom the English court can exercise jurisdiction.

19 However, these conditions are not preconditions for the court to accept jurisdiction in relation to a scheme of arrangement.¹¹ In *Re Drax Holdings* [2004] 1 WLR 1049, Collins J held that the exercise of the jurisdiction was a discretionary power of the court.

20 In *Re Dap Holding NV* [2005] EWHC 2092 (Ch), it was held that English courts can assume jurisdiction to sanction a scheme of a company whose COMI was situated in another member state. In brief, Lewison J reasoned that since elements like insolvency and the presence of an establishment within a member state are transient and may change, there is nothing preventing an English court to conclude that a company is liable to be wound up in the United Kingdom, as long as there is sufficient connection with the United Kingdom.

21 Since then, this position to assume jurisdiction where the scheme company did neither have its centre of main interests (“COMI”) nor an establishment in the United Kingdom, as per Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings (the “European Insolvency Regulation”), has been reaffirmed by the English courts in a substantial number of cases, such as (more recently) *Rodenstock*, *PrimaCom*, *NEF Telecom* and *Apcoa Parking*.¹² Consequently, it is now generally accepted by the English courts that jurisdiction can be assumed for schemes in relation to foreign companies with neither COMI

¹¹ See L-C. Ho, “Making and Enforcing International Schemes of Arrangement” (2011) 26(9) *Journal of International Banking Law and Regulation* 434-443.

¹² *Rodenstock* [2011] EWHC 1104 (Ch), *PrimaCom* [2011] EWHC 3746 (Ch) (at the convening stage) and [2011] EWHC 3746 (Ch) (at the sanctioning stage), *Re NEF Telecom* [2012] EWHC 2944 (Ch), *Re Apcoa Parking Holdings GmbH* [2014] EWHC 997 (Ch) and [2014] EWHC 3849 (Ch) (two schemes were sanctioned relating to *Apcoa Parking*).

nor an establishment in the United Kingdom, provided that there is sufficient connection with the English jurisdiction.

22 In many recent cases the sufficient connection was found in the governing law and jurisdiction clauses, where the scheme was aimed at a debt restructuring of a foreign company, of which the underlying finance documents were governed by English law and the English courts having jurisdiction.

23 In *Re Rodenstock*, Briggs J made a detailed analysis as to why a choice for English law and the English courts (under a senior facilities agreement) constitutes sufficient connection to assume scheme jurisdiction. *Rodenstock* was a company registered in Germany, but the senior finance documents were governed by English law and contained a choice for jurisdiction of the English courts. Briggs J acknowledged that it would not be correct to treat the lenders' choice of English jurisdiction for the purposes of resolving disputes in connection with the contract, as a deliberate decision to voluntarily subject themselves to the English court's scheme jurisdiction. However, he continued to consider that such choice for English law did mean that the rights of the lenders could be affected by any court sanctioned scheme (in any country), if such court decision would be recognised under English law. Consequently, Briggs J came to the conclusion that the connection constituted by the choice of English law and English jurisdiction is on its own a sufficient connection for the purposes of assuming scheme jurisdiction in relation to the German company.

24 In his judgment, Briggs J added that he considered it relevant that the case at hand did not concern a large number of individual (lending) contracts that happened to contain English law and jurisdiction clauses, but rather a case where the creditors have collectively chosen by a single agreement, to have the relationship between the creditors inter se, and between them as a body and the company governed by English law and subjected to the jurisdiction of the English courts.

25 This reasoning has been frequently quoted and followed in subsequent cases, in which - again - the sufficient connection was based on the contractual choice for English law and jurisdiction.

26 In *Re Rodenstock*, Briggs J considered it relevant that more than 50% of the scheme creditors were domiciled in England. In *Re Primacom* the court was confronted with a matter in which it was not certain that there were any scheme creditors domiciled in the United Kingdom, or at any rate certainly not a majority in any of the classes of such creditors. Nonetheless, Hildyard J found that the fact that English law was the governing law for all creditor arrangements did provide a sufficient connection to the jurisdiction to warrant the exercise by the English court

of the scheme jurisdiction.¹³ The fact that it was uncertain that any scheme creditors were domiciled in the United Kingdom, did not alter this.¹⁴

27 A next development in using the contractual jurisdiction clauses as sufficient connection can be found in the recent decisions in two schemes relating to *Re Apcoa Parking* [2014] EWHC 1867 (Ch) and [2014] EWHC 3849 (Ch). Seven of the nine scheme companies were not incorporated in England and did not have their COMI in the United Kingdom. Furthermore, the facility agreements originally contained German governing law and jurisdiction clauses. Prior to applying for the scheme, the governing law and jurisdiction clauses of the facility agreements were amended (in accordance with contractually required majority consent from lenders) from German law and the jurisdiction of the Frankfurt courts, to English law and the jurisdiction of the English courts. This amendment to the facility agreement was expressly made to enable schemes of arrangement to be proposed. The English court sanctioned this approach.

28 This indicates that English courts are prepared to go a long way in accepting contractual jurisdiction clauses as the required sufficient connection to assume scheme jurisdiction.

29 Remarkable in the development of English case law is *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch). This case concerned a company, Magyar Telecom B.V., incorporated and registered in the Netherlands, being a group holding and finance vehicle for a group whose principal business was the operation of telecommunication services in Hungary. The liabilities that were to be subjected to the scheme were notes governed by New York law and subject to the jurisdiction of the New York courts. Thus, on the face of the facts, no connection with the United Kingdom existed. However, prior to applying for the scheme, the company moved its COMI to the United Kingdom. The company argued that its COMI being in the United Kingdom would provide the English court with scheme jurisdiction. The court allowed this approach and accepted jurisdiction to sanction the scheme, solely on the basis of COMI.

30 In his judgment, Richards J elaborated on the (many) manners in which sufficient connection can be achieved. He considered that the presence in England of substantial assets belonging to the scheme company could provide the requisite connection because it would prevent execution by the relevant creditors against those assets, save in accordance with the terms of the scheme. Equally, the presence of a sufficient number of creditors in England might also supply the necessary connection, as those creditors would be bound to act in accordance with the scheme, both within and outside the jurisdiction. According to Richards J, the importance of the connection provided in cases where the rights of creditors are

¹³ Hildyard J in his judgment of 20 December 2011 in *PrimaCom* [2011] EWHC 3746 (Ch).

¹⁴ Judgment of 20 January 2012 [2012] EWHC 164 (Ch).

governed by English law lies in the effect which foreign courts may be expected to give to an alteration of those rights in accordance with English law. And in the case before him, Richards J considered that the significance of moving the COMI to England did not lie in the establishment in the abstract of a connection with England but, on the basis that any insolvency process for the company would be undertaken under English law in England, providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law.

31 In principle, we agree with the arguments of Richards J set out above and take the view that COMI being in England indeed gives a valid argument to accept that the English courts have jurisdiction to sanction a scheme. The scheme of arrangement is intended to restructure a company's debts. If jurisdiction to restructure debts of an insolvent company is based on COMI, there seems little reason not to accept the same argument for solvent restructurings by means of a scheme.

32 The above concise outline of the development of English case on schemes over foreign companies and in particular the deliberations of Richards J in *Re Magyar Telecom*, show that the English courts have taken a rather chameleonesque approach to establish sufficient connection, i.e. to be able to assume scheme jurisdiction. In *Re Rodenstock*, Briggs J acknowledged that it was doubtful that creditors who accept that any disputes under that contract would be governed by English law and subjected to the English courts, will have also voluntarily, deliberately and (we would add) consciously subjected themselves to the English courts' scheme jurisdiction. That seems a valid point, also taking into account that the scheme of arrangement is part of the Companies Act 2006 and could also be applied to other debts that have no contractual background.

33 It seems that in the view of Briggs J, it is not so much a conscious and voluntary choice by the creditor, but rather that a creditor, who accepts that his rights are governed by English law, will also have to accept that his rights are "at risk" to be altered by any tool that would consequently be recognised by the English courts. It seems that in concluding this, Briggs J also took into account that the case at hand did not concern individual contracts but one contract binding all scheme creditors and that the majority of creditors resided in the United Kingdom. Adding all these elements together, he concluded, on a narrow balance, that the court had jurisdiction. However, by now, we must conclude that even in cases that seem to have considerably less connection at the outset, the (narrow) balance still rules in favour of assuming jurisdiction. Even if creditors would consciously and deliberately choose not to be exposed to the "risk" of being subjected to an English scheme (by dealing with a foreign company, with no assets or creditors in the UK and by choosing a different law for their contract), these cases show that the creditors' rights are still liable to be altered by an English scheme. Parties who want to use a scheme can choose from a number of options to create a connection

with England, even if, at the outset, no connection exists. In particular where creditors' rights are based on contractual arrangements, meaning that parties consciously opted for another jurisdiction than England, we find this development to be pushing the envelope.

Jurisdiction under European Law: Brussels I, European Insolvency Regulation

34 As mentioned in the introduction above, the English courts have also been conscious that the combined effect of the European Insolvency Regulation and the Brussels I Regulation has been very substantially to curtail the international jurisdiction of the English court to wind up companies. Therefore, the judges in the cases described above have considered whether and to what extent the court could accept jurisdiction in accordance with the relevant European Regulations, most notably Brussels I and the European Insolvency Regulation.

35 The English courts have been consistent in ruling that jurisdiction to sanction a scheme is not based on the European Insolvency Regulation. In our view, that is correct. The European Insolvency Regulation contains uniform rules on jurisdiction in relation to insolvency proceedings. There can be no doubt that a scheme of arrangement that is proposed and sanctioned outside the framework of insolvency proceedings – in fact, to prevent the opening of insolvency proceedings – falls outside the scope of the European Insolvency Regulation.¹⁵

36 Pursuant to its Article 1(1), the European Insolvency Regulation applies to “collective insolvency proceedings, which entail the partial or total divestment of a debtor and the appointment of a liquidator.” A scheme of arrangement under Part 26 of the Companies Act 2006 does not fall within this definition. Furthermore, the proceedings to which the European Insolvency Regulation applies are listed (exhaustively) in Annex A to the regulation. Schemes of arrangement under the Companies Act 2006 are not included in Annex A.

37 If scheme jurisdiction would have fallen within the scope of the European Insolvency Regulation, English courts would only be able to accept jurisdiction if the scheme applicant has its COMI or, under certain circumstances, an establishment in the United Kingdom, pursuant to Article 3.

38 The English courts have been less consistent in their views as to whether the court sanction of a scheme would fall within the scope of the Brussels I Regulation. In fact, the aforementioned chameleonesque approach of the English courts as to

¹⁵ Doubts as to the applicability of the European Insolvency Regulation are also expressed by, for example, F. Garcimartin, “The Review of the Insolvency Regulation: Hybrid Procedures and other Issues” (2011) *International Insolvency Law Review* 329; Wessels is more firm in his rejection of the applicability of the European Insolvency Regulation to schemes of arrangement, see B. Wessels, “Scheme of Arrangement: a Viable European Rescue Strategy?” (2010) *Ondernemingsrecht* 154.

assuming jurisdiction can also be seen in the manner in which the English courts have dealt with the Brussels I Regulation. For example, in *Re DAP Holding NV*, Lewison J considered the scheme sanction to be expressly excluded from the scope of Brussels I Regulation, considering the scheme to be a judicial arrangement as excluded from the Regulation pursuant to its Article 1(2)b. In *Re Rodenstock*, Briggs J had difficulties with that conclusion (in relation to solvent companies) to wholly exclude schemes based on Article 1(2)b. We agree with Briggs J, given that the European Insolvency Regulation and the Brussels I Regulation are intended to “dovetail with each other”, so that no lacuna exists between the two. If a court sanction of an arrangement or composition does not fall within the scope of the European Insolvency Regulation, it should not be excluded from the Brussels I Regulation on the basis of Article 1(2)b. Therefore, as Briggs J holds, proceedings seeking the court’s sanction of a scheme fall within the Brussels I Regulation.

39 However, in the different judgments, the respective judges came to rather different conclusions as to whether the Brussels I Regulation would not narrow the English court’s jurisdiction in relation to schemes.

40 In *Re Rodenstock*, Briggs J considered that Chapter II of the Brussels I Regulation allocates jurisdiction by reference to the domicile of the intended defendants. None of the exceptions are apt to address the international jurisdiction of the courts of Member States in relation to solvent company schemes of arrangement. He reasoned that schemes are not aimed at specific defendants, but that schemes may nonetheless be adversarial and opposing creditors may submit statements and evidence in court as any ordinary defendant. He subsequently concluded that he did have jurisdiction either:

- (i) on the basis that there is a lacuna in Chapter 2 of the Brussels I Regulation, such as by analogy with Article 4 to enable each Member State to continue to apply its own private international law; or
- (ii) because one or more creditors of the company affected by the proposed scheme were domiciled in the United Kingdom, treating such person as quasi defendants. Briggs J did not effectively choose between the two options (since both lines of reasoning would lead to him assuming jurisdiction).

41 In *Re Primacom*, Hildyard J came to a different analysis, providing four options as to why the court would have jurisdiction:

- (i) Article 2 of the Brussels I Regulation has no application since a scheme does not involve defendants;
- (ii) If Article 2 would apply (but no defendants/scheme creditors would be domiciled in the United Kingdom), Article 23 allows parties to contractually agree on a forum (meaning that the jurisdiction clause in the finance agreements created scheme jurisdiction);
- (iii) Pursuant to Article 24, a court has jurisdiction if a defendant appears (meaning that if all scheme creditors have in fact appeared in the English court, the court has jurisdiction);
- (iv) If no provisions of the Brussels I Regulation is applicable, the court should apply its domestic rules of private international law.

42 Since in the matter before him, Hildyard could accept jurisdiction via any of the four options, he (like Briggs J) did not choose, although he expressed a preference for the first option. In subsequent cases, judges used these options to establish jurisdiction, but picking the options that could apply to the facts of the case at hand and explicitly leaving unanswered the question whether creditors to a scheme should be considered defendants or not.

43 Furthermore, in *Re NEF Telecom*, Vos J explicitly considers that any party signing up to English law and jurisdiction must understand that the provisions of Part 26 of the Companies Act 2006 may be invoked. This seems different from the view of Briggs J in *Re Rodenstock* who, as we have seen, assumed that a party does not necessarily (consciously) understand this.

44 In *Re Magyar Telecom*, jurisdiction was assumed, either on the basis that Chapter II of the Brussels I Regulation does not apply (on the basis that a scheme has no defendants) or on the basis that one or more defendants/scheme creditors were domiciled in England (creating jurisdiction over all defendants pursuant to Article 6 of the Brussels I Regulation). Obviously, since the financing agreements in this case were not governed by English law, Richards J could not rely on Article 23 for jurisdiction and thus had to follow a different line of reasoning than Vos J in *Re NEF Telecom*.

45 When looking at the deliberations of the English courts on this topic, we must conclude that the courts are somewhat struggling to come to a final conclusion as to how their jurisdiction fits in with the provisions of the Brussels I Regulation. By leaving the question unanswered, the courts maintain a large amount of flexibility in respect of their reasoning to assume jurisdiction. We have seen the diversity and development of arguments and factual circumstances presented to the court when requested to sanction a scheme. By leaving unanswered the exact interpretation of the Brussels I Regulation, the courts avoid the risk that certain cases would no longer fall within the jurisdiction of the English court.

46 The consequence of this approach is that there is a substantial amount of uncertainty as to where the boundaries lie with respect to the English courts accepting jurisdiction to sanction a scheme.

Conclusion

47 We have seen that the English courts have taken a chameleonesque approach in accepting jurisdiction and have consciously left open certain questions as to on what basis jurisdiction is assumed. It seems to us that in accepting jurisdiction, in each particular case the English courts have consciously looked at the (lack of) possibilities for the company to achieve a similar restructuring in its jurisdiction of origin. In each new case that did not fall exactly in the scope provided by

precedent, the English courts have continued to take a cooperative (and commercially probably sensible) approach: if it is in the interest of the company and its stakeholders to sanction the scheme (based on the substantive criteria that the court looks at when sanctioning a scheme), the English courts are prepared to go a long way (sometimes possibly pushing the envelope) to assume jurisdiction.

48 For the (legal) restructuring practice, this approach seems sensible (in particular if no similar restructuring tools are available in other jurisdictions). However, from a dogmatic perspective, the reasoning of the English courts is somewhat inconsistent and inconclusive. In any event, it leaves considerable doubt (for creditors) as to whether their rights can be subjected to a scheme of arrangement.

Recognition of Schemes of Arrangement in other EU Member States

Introduction

49 When looking at the operation of schemes of arrangement under Part 26 of the Companies Act 2006 in respect of non-UK companies – and, in particular, whether it will prevent creditors from effectively seeking recourse against the scheme company in other EU member states beyond the terms of the scheme – it is important to assess whether such schemes will be recognised abroad.

50 In this paragraph we will first of all discuss possibly relevant EU legislation in place: (i) the European Insolvency Regulation and the recently adopted amendments to the European Insolvency Regulation (“recast”), (ii) the Rome I Regulation, and (iii) the Brussels I Regulation. We will also briefly touch upon the recognition of schemes of arrangement under rules of Dutch domestic private international law.

European Insolvency Regulation

51 As pointed out above, the European Insolvency Regulation contains uniform rules on jurisdiction, applicable law and recognition of judgments in relation to insolvency proceedings. In our view a scheme of arrangement outside the framework of insolvency proceedings falls outside the scope of the European Insolvency Regulation.

52 A scheme of arrangement under Part 26 of the Companies Act 2006 does not fall within the definition of Article 1(1) of the European Insolvency Regulation as to what constitutes insolvency proceedings for the purposes of the text. Furthermore, the proceedings to which the European Insolvency Regulation applies

are listed (exhaustively) in Annex A to the text and schemes are not listed in that Annex.¹⁶

53 In its report on the operation of the European Insolvency Regulation of 12 December 2012, the European Commission identified a number of pre-insolvency proceedings available in the EU Member States, including the English scheme of arrangement, which are not covered by the European Insolvency Regulation and observed:

“The main problem resulting from the fact that a substantial number of pre-insolvency and hybrid proceedings are currently not covered by the Regulation is that their effects are not recognised throughout the EU. As a consequence, dissenting creditors may seek to enforce their claims against assets of the debtor located in another Member State, which can thwart the efforts to rescue the company (so-called “holding-out” problem). Moreover, opportunities to rescue companies may be foregone because parties are unwilling to engage in the relevant procedures if their cross-border recognition is not ensured. It has therefore been recommended to address these problems in the revision of the Regulation.”¹⁷

54 As we will set out below, we believe that this conclusion of the European Commission is not correct, at least not in respect of the English law scheme of arrangement, which in our view may be recognised and given effect under the Brussels I Regulation. However, following on the observations of the European Commission, the proposals to reform the European Insolvency Regulation that were presented by the European Commission on 12 December 2012, provided for the extension of the scope of the European Insolvency Regulation to pre-insolvency proceedings, such as the scheme of arrangement.¹⁸

55 The possible extension of the scope of the European Insolvency Regulation to schemes of arrangement gave rise to considerable and understandable debate. Even though schemes of arrangement are (successfully) used as a restructuring tool that avoids the opening of insolvency proceedings (and therefore may qualify as pre-insolvency proceedings within the proposals of the European Commission), it must be noted that it would not be right to simply include schemes of arrangement under Part 26 of the Companies Act 2006 in Annex A of the European Insolvency Regulation (if ever the UK government were to consider doing that). Schemes of arrangement serve a much wider (corporate) purpose and in many instances are used in situations that have nothing to do with insolvency. Furthermore, the effect of including schemes of arrangement within the scope of the European Insolvency

¹⁶ Cf. Article 2(a), European Insolvency Regulation and preamble, paragraph 9.

¹⁷ Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, 12 December 2012, COM(2012) 743 final, at 6.

¹⁸ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, 12 December 2012, COM(2012) 744 final, in particular at 2, 5 and 6, 15 (proposed recital 9(a)) and 19 (proposed amendment to Article 1).

Regulation would not only be that they would benefit from the uniform rules on recognition in other Member States but also that the English courts would be bound by the uniform rules on jurisdiction embodied in the European Insolvency Regulation. Schemes of arrangement would then no longer be possible on the mere basis that a contractual relationship to be amended by a scheme is governed by English law (and provides for the jurisdiction of the English courts to settle disputes arising from it), but English courts would only have jurisdiction over scheme companies that have their COMI in the UK.

56 The recast of the European Insolvency Regulation, on which political agreement was reached between the Council and the European Parliament on 4 December 2014,¹⁹ appears to have effectively dealt with the issue. The definition of the types of proceedings that fall within the scope of the European Insolvency Regulation (recast) leaves no room for the inclusion of schemes of arrangement in Annex A. Pursuant to Article 1(1) of the recast, the European Insolvency Regulation will apply to:

“public collective proceedings, including interim proceedings, which are based on a law relating to insolvency...”.

57 Schemes of arrangement under Part 26 of the Companies Act 2006 are a tool of general company law and are not based on a law relating to insolvency. Schemes are therefore “out”. The question whether and to what extent schemes are recognised and will be given effect in other Member States, that was the driver for the European Commission to suggest their inclusion in the European Insolvency Regulation, is consequently left open.

Rome I Regulation

58 It has been argued that a scheme of arrangement under Part 26 of the Companies Act 2006 can have substantive effect pursuant to the Rome I Regulation to the extent that it amends a contract that is expressed to be governed by English law.²⁰ If the contract that is to be affected by a scheme is governed by English law, any amendment to or waiver of contractual claims under that contract will also generally be subject to English law.²¹ In this approach it is in principle irrelevant as to which kind of jurisdiction an English court was exercising, since jurisdiction is not one of the relevant criteria in the Rome I Regulation.

¹⁹ We understand that the Council is due to formally adopt the recast regulation in March 2015, which will then be passed to the European Parliament in April or May 2015 with a view to an approval by the plenary, without amendments in second reading. The recast regulation will be effective upon publication in the Official Journal, which is expected around May 2015.

²⁰ Garcimartín, above note 15, at 330-331. We understand that in some of the cases that have come before the English courts, local experts have taken the position that a scheme of arrangement will have substantive effect in their jurisdiction on this basis.

²¹ Cf. Article 12(1)(d), Rome I Regulation.

59 The correctness of this approach has not been tested in court (to our knowledge). The difficulty we have with this approach is twofold. Firstly, it is not clear whether a scheme of arrangement under the Companies Act 2006 can – for purposes of private international law and the Rome I Regulation in particular – be characterized as an issue of contract law. We do not share the apparent belief expressed by Garcimartin that this is a (somewhat peculiar) example of the “various ways of extinguishing obligations” referred to in Article 12(1)(d) of the Rome I Regulation.²² The characterization of schemes of arrangement as a matter of contract law, is also not (necessarily) supported by the approach to schemes under English law. Hannigan observes that:

“Though binding the members or creditors to the same extent as if they had made a contract, a scheme is not a contract, but a statutory procedure subject to court approval.”²³

60 Furthermore, if the scheme of arrangement were indeed a matter of contract law, it would limit the powers of the English courts to (sanction) schemes that affect the rights of creditors under contracts that are governed by English law, which is an approach that the English courts do not follow in respect of companies incorporated under English law and with COMI in the UK.²⁴ Starting from this “contractual” approach it is, for example, difficult to understand how the English courts could amend the terms of bonds that are governed by New York law as was the case in the scheme in relation to Magyar Telecom.²⁵

61 Secondly, in our view this “contractual” approach disregards the fact that dissenting creditors are bound to the scheme (and thus the amended contract) pursuant to the judgment of the court sanctioning the scheme (notwithstanding their objections or the fact that they did not vote). Without recognition of that judgment it appears difficult, if not impossible, to argue that the effects of the scheme (on the contract) can take effect against such dissenting creditors. In our view, the recognition of the court order sanctioning the scheme is pivotal. This places it much more in the domain of the Brussels I Regulation.

²² Above note 20.

²³ Hannigan, above note 9, at paragraphs 26-101.

²⁴ See, for example, the scheme of arrangement in respect of the English insurance company Equitable Life, which also purported to amend rights of policy holders under insurance policies governed by German law. The German Bundesgerichtshof denied recognition to this scheme, not because the claims of the German policy holders were governed by German law and therefore could not be amended pursuant to an English law scheme of arrangement, but because the rules of jurisdiction in relation to insurance contracts under the Brussels I Regulation had not been observed (see BGH 15 February 2012 (IV ZR 194/09)).

²⁵ [2013] EWHC 3800 (Ch).

Brussels I Regulation

62 In our view a scheme of arrangement may be recognised and given effect under the Brussels I Regulation. The order of the English court confirming a scheme of arrangement, in our view is a judgment within the terms of Article 32 of the Brussels I Regulation that should be recognised in accordance with Articles 33 et seq. of the Brussels I Regulation.

63 A scheme of arrangement falls within the material scope of application of the Brussels I Regulation. It clearly concerns a civil or commercial matter within the meaning of Article 1(1) of the Brussels I Regulation. We have no doubt that a scheme of arrangement fits into that category. There are, however, some potential obstacles in respect of the applicability of the Brussels I Regulation.

64 Article 1(2)(b) of the Brussels I Regulation excludes from its scope:

“bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.”

65 The question that arises is whether a judgment sanctioning a scheme in accordance with Part 26 of the Companies Act 2006 is excluded from the scope of application of the Brussels Regulation pursuant to this provision. In our view this is not the case. Further, the exclusion of the issues referred to in Article 1(2)(b) of the Brussels I Regulation must be considered in relation to the scope of application of the European Insolvency Regulation. The two regulations should dovetail almost completely. This was reaffirmed by the Court of Justice of the European Union in its decision of 4 September 2014, where the Court observed:

“In this respect, it should be noted that, relying inter alia on the preparatory documents relating to the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L 304, p. 36), which was replaced by Regulation No 44/2001, the Court has held that that regulation and Regulation No 1346/2000 must be interpreted in such a way as to avoid any overlap between the rules of law that those texts lay down and any legal vacuum. Accordingly, actions excluded, under Article 1(2)(b) of Regulation No 44/2001, from the application of that regulation in so far as they come under ‘bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings’ fall within the scope of Regulation No 1346/2000. Following the same reasoning, actions which fall outside the scope of Article 3(1) of Regulation No 1346/2000 fall within the scope of Regulation No 44/2001 (judgment in *F-Tex*, C-213/10, EU:C:2012:215, paragraphs 21, 29 and 48).”²⁶

²⁶ CJEU 4 September 2014, case C-157/13 (*Nickel & Goeldner Spedition v Kintra*). See also P. Jenard, “Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters” *Official Journal* J 5 March 1979, nr C 59, at 11 and 12; P. Schlosser, “Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Protocol on its Interpretation by the Court of Justice” *Official Journal* 5 March 1979, nr C 59, at paragraph 53.

66 The issues that fall within the scope of application of the European Insolvency Regulation are governed by the specific rules (on jurisdiction, applicable law and recognition) of the European Insolvency Regulation and are excluded from the scope of application of the Brussels Regulation. Similarly, issues that fall outside the scope of application of the European Insolvency Regulation are included in the scope of the Brussels I Regulation (provided, of course, that they are civil or commercial matters that are not excluded from the scope of application of the Brussels I Regulation for some other reason, for example because they concern arbitration, cf. Article 1(2)(d) of the Brussels I Regulation).

67 Article 1(2)(b) of the Brussels I Regulation therefore entails that a court approved composition that is concluded within the framework of an insolvency proceeding is excluded from the scope of the Brussels I Regulation.²⁷ It does not lead to a scheme of arrangement, which is adopted outside the framework of – and in fact to prevent – insolvency proceedings, being excluded from the scope of application of the Brussels I Regulation.²⁸

68 A further possible obstacle to the applicability of the Brussels I Regulation that has been identified is that the Brussels I Regulation would only apply to contentious or adversary proceedings. It has been argued that the rules (on jurisdiction) of the Brussels I Regulation only apply to actions or claims in which the court settles a dispute between parties (hence the references in the regulation to “plaintiff”, “defendant”, “shall be sued”, etc.). Given the fact that the interventions of the English court in relation to a scheme are not of that nature – the court does not settle a dispute between parties, but only intervenes to ensure that the “cram down” of the scheme on the minority of dissenting or not voting creditors is not unreasonable –, schemes could not be characterized as proceedings and the order sanctioning a scheme could not be characterized as a judgment for purposes of the Brussels I Regulation.²⁹

69 We do not share that view. The court order sanctioning a scheme of arrangement, in our view, constitutes a judgment within the terms of Article 32 of the Brussels I Regulation.³⁰ Article 32 of the Brussels I Regulation has a very wide

²⁷ See Article 25(1), European Insolvency Regulation.

²⁸ See also the observations of Briggs J. in the matter of *Rodenstock* [2011] EWHC 1104 (Ch), at paragraph 51: “In my judgment, proceedings seeking the court’s sanction of a scheme in relation to a solvent company do fall within the scope of the Judgments Regulation. They are plainly ‘civil and commercial matters’ within Article 1 and it was no part of the purpose of the bankruptcy exclusion in Article 1.2(b), construed having regard for example to the Schlosser Report, to exclude any civil or commercial matter which was not to fall within the scope of the European Insolvency Regulation or, more generally, which was not connected with bankruptcy or insolvency.”

²⁹ Above note 20, at 328.

³⁰ A German court in the matter of *Equitable Life* (OLG Celle, 8 September 2009) took the view that a court order sanctioning a scheme of arrangement is not a judgment within the terms of Article 32 of the Brussels I Regulation. This decision was appealed to the German Bundesgerichtshof, which rendered

notion of “judgment”. The Brussels I Regulation applies to decisions taken by a court, irrespective of the particular manner in which the proceedings started. The Brussels I Regulation does not require any particular procedural form for a judgment. It applies to contentious proceedings that commence with a summons, but it equally applies to cases of voluntary jurisdiction where the proceedings start with a petition to the court (in Dutch: “*verzoekschrift*”) and there are no “defendants”.³¹ In the assessment of whether a court order sanctioning a scheme is a judgment within the terms of Article 32 of the Brussels I Regulation, it is important to also keep in mind that the role of the court that sanctions a scheme of arrangement is not merely a formal or “rubber stamping” one given that all interested parties, i.e. the creditors that will be affected by the proposed scheme, are invited before the court to express their views and raise possible objections to the scheme. A judge hearing an application to sanction a scheme will determine whether he has jurisdiction to sanction the scheme and whether he is satisfied that it is appropriate to exercise his discretion to sanction the scheme, even if there has

its decision on 15 February 2012 (IV ZR 194/09). In its decision the German Bundesgerichtshof acknowledged that there are good reasons to argue that the court order sanctioning a scheme of arrangement is a judgment within the terms of Article 32, Brussels I Regulation, in particular in view of the contentious elements of the proceedings under Part 26, Companies Act 2006, but it did not decide the question (nor did it refer questions for a preliminary ruling to the Court of Justice of the European Union), because, according to the Bundesgerichtshof, recognition of the order was, in that case, prevented by Article 35(1), Brussels I Regulation, given that, briefly stated, the scheme in that case sought to vary or modify claims under insurance policies (governed by German law and) concerning German policy holders in respect of which the jurisdiction of the English courts conflicted with Articles 8 and 12, Brussels I Regulation.

³¹ See P. Jenard, “Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters” *Official Journal* of 5 March 1979, C 59, at 9. “The Convention also applies irrespective of whether the proceedings are contentious or non-contentious.” See also P. Schlosser, “Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the Protocol on its Interpretation by the Court of Justice” *Official Journal* 5 March 1979, nr C 59, at paragraph 23: “The scope of the 1968 Convention is limited to legal proceedings and judgments which relate to civil and commercial matters. All such proceedings not expressly excluded fall within its scope.” Non-contentious proceedings are not expressly excluded. That non-contentious proceedings (cases of voluntary jurisdiction that start with a petition to the court) are included in the scope of the Brussels I Regulation is also the position of the Court of Appeal of Amsterdam in respect of petitions for the sanctioning of collective settlements under the Act on the Collective Settlement of Mass Damage Claims (*Wet collectieve afwikkeling massaschade*), see e.g. Hof Amsterdam 12 November 2010, LJN: BO3908 (Converium). The Act provides for collective redress in mass damages on the basis of a settlement agreement concluded between one or more foundations or associations representing a group (class) of affected persons to whom damage was allegedly caused and one or more allegedly liable parties. Once a settlement agreement is concluded by the parties, they may then jointly request the Amsterdam Court of Appeal to declare this collective settlement binding. If the court grants the request, the agreement binds all persons covered by its terms and represented by the representative foundation(s) or association(s), except for those persons who notified that they do not wish to be bound by the agreement (“opt out”), within a period to be determined by the Court of at least three months following its judgment that gives binding effect to the collective settlement.

been no opposition to the scheme at the hearing.³² In considering whether to sanction a scheme the court will take into account, amongst other things:

- (a) whether all relevant formalities have been complied with;
- (b) whether the meetings of creditors have been properly held and the majority acted *bona fide* in supporting the scheme; and
- (c) whether the scheme is such that an intelligent and honest person, who is a member of the class concerned and acting alone in respect of his interests as such a member, might reasonably approve it.

70 The judgment sanctioning the scheme also has the effect of a conclusive judgment. In particular, in respect of outvoted dissenting creditors, the judgment has constitutive effect in the sense that, as a result of the court sanctioning the scheme, they are also bound by the scheme notwithstanding that they voted against the adoption of the scheme.³³ If a court order sanctioning a scheme of arrangement is within the scope of the Brussels I Regulation and constitutes a judgment within the terms of Article 32 of the Brussels I Regulation (which, in our view, is the case), it shall be recognised in the other EU Member States, unless one of the grounds for non-recognition as exhaustively listed in Articles 34 and 35(1) of the Brussels I Regulation applies.

71 In view of our critical observations regarding the situations in which English courts are willing to accept jurisdiction to sanction schemes in relation to non-UK companies, it is important to note that, pursuant to Article 35(3) of the Brussels I Regulation, a court in another Member State may not review the jurisdiction of the English courts in sanctioning a scheme of arrangement. This is only different if such jurisdiction conflicts with sections 3, 4 or 6 of Chapter II or in a case provided for in Article 72 of the Brussels I Regulation (see Article 35(1) of the Brussels I Regulation).³⁴ This means that recognition of the court order sanctioning the scheme in principle does not require that the English courts have assumed jurisdiction in accordance with the rules of the Brussels I Regulation. Even if schemes are “caught by” the Brussels I Regulation, this does not prevent the English courts from applying their own domestic rules on jurisdiction or, at least, doing so does not necessarily block the recognition of the scheme in other EU Member States.

³² As is shown, for example, by the judgment in *Rodenstock* [2011] EWHC 1104 (Ch).

³³ A similar argument has been made in respect of the judgment by the Court of Appeal in Amsterdam confirming settlements pursuant to the Dutch Act on the Collective Settlement of Mass Damage Claims (*Wet collectieve afwikkeling massaschade*), cf. H. van Lith, “The Dutch Collective Settlements Act and Private International Law” (2011) 2 *IPR Thema Reeks* (2011, Maklu Publishers, Apeldoorn), at paragraph 5.2.

³⁴ This means, for example, that if a scheme is aimed at the dissolution of a company as referred to in Article 22(2), Brussels I Regulation, such scheme shall not be recognised in other Member States if the company does not have its seat in England.

72 A court order sanctioning a scheme may also be denied recognition if such recognition would be “*manifestly contrary to public policy*” in the Member State in which recognition is sought (Article 34(1) of the Brussels I Regulation). This will not easily be the case. The public policy exception:

- (a) can only prevent recognition in exceptional circumstances;
- (b) is not easily accepted; and
- (c) may not be applied to the rules relating to jurisdiction.

73 Article 34(1) of the Brussels I Regulation can, in our view, generally not prevent recognition of English schemes in the other Member States. If fundamental principles of fair trial are observed in the proceedings leading to the sanctioning of the scheme by the English court, it will be difficult to argue that recognition of the scheme is manifestly contrary to the public policy of another Member States. For example, in the Netherlands, even though Dutch law – at present³⁵ – does not have an equivalent to an English law scheme of arrangement, Dutch law is not unfamiliar with situations where the binding force of a majority decision is imposed (if sanctioned by the court) on dissenting creditors and creditors that did not vote³⁶ and thus, in our view, recognition of the binding effect of a scheme that is supported by the requisite majority of creditors and sanctioned by the court is not incompatible with the core values of Dutch law.

Conclusion

74 English courts (rightfully) take into consideration, when requested to sanction a scheme of arrangement, whether the decision and thus the implications of the scheme will be recognised in other Member States. As demonstrated above, we believe that based under the EU rules, the sanction of a scheme by an English court should be recognised in other Member States. This recognition should not be based on the European Insolvency Regulation or the Rome I Regulation, but on the Brussels I Regulation, on the basis that the court order sanctioning a scheme must be considered a judgment within the Brussels I Regulation.

75 Should the Brussels I Regulation not be applicable, recognition of a scheme of arrangement may be based on rules of domestic private international law. In this respect, from a Dutch perspective we note that in our view it is likely that a Dutch court will nevertheless recognise the English court order sanctioning a scheme –

³⁵ As mentioned in the introduction, a pre-draft for a bill has been released, in which a Dutch scheme of arrangement is proposed.

³⁶ Both formal Dutch insolvency proceedings, *surseance van betaling* and *faillissement* allow for a composition plan to be presented to and voted on by creditors, whereby the majority approval will bind all creditors. Also, the aforementioned pre-draft bill for the introduction of a Dutch scheme of arrangement has received broad support amongst scholars and practitioners.

thus giving effect to the scheme in the Netherlands – under rules of Dutch domestic private international law.³⁷

Concluding Observations

76 As we have discussed in this contribution, English courts have recently been requested frequently to sanction schemes of arrangement to restructure the debts of non-UK companies on the basis of Chapter 26 of the Companies Act 2006. In its decisions, the court considers both the grounds to accept jurisdiction and the question whether the court order sanctioning the scheme will be recognized in other Member States.

77 We find that in the development of case law, the English courts have taken a chameleonesque approach when establishing the required sufficient connection with the English jurisdiction, in order to sanction schemes. It seems that even in situations where there seems to be no relevant connection with the United Kingdom at the outset, the courts will go a long way in finding (aided by counsel) a connection with the United Kingdom that suffices to accept jurisdiction. In doing so, the courts have been pushing the envelope.

78 We have concluded that an English court order sanctioning a scheme of arrangement should be recognised in other Member States, based on the fact that the court order falls within the scope of the Brussels I Regulation. That Regulation does not allow the court in which recognition is sought, to (really) revisit the question whether the English court was right in accepting jurisdiction. Consequently, once the English court has accepted jurisdiction and sanctioned the scheme, there is no real possibility to avoid the consequences of the scheme in other Member States by challenging recognition of the court order.

79 It seems that one of the reasons, if not the sole reason, why non UK-companies have sought assistance from the English law and English courts by means of a

³⁷ The relevant conditions are (i) that the foreign court assumed jurisdiction on internationally acceptable grounds, (ii) the proceedings were held in accordance with principles of fair trial and (iii) such recognition is not in conflict with Dutch public policy. We believe that these conditions are met. In comparison, according to the Dutch Code of Civil Procedure, the Dutch courts, inter alia, have jurisdiction in matters that commence by the filing of a petition if: (a) either one or more of the applicants or one of the interested parties mentioned in the petition is domiciled or habitually resident in the Netherlands; or (b) the matter is otherwise sufficiently connected to the legal sphere of the Netherlands. This view is also supported by the fact that the Dutch courts in practice also rather generously accept jurisdiction in respect of the sanctioning of settlements under the Act on the Collective Settlement of Mass Damage Claims (*Wet collectieve afwikkeling massaschade*), in one case (Converium) accepting jurisdiction although only some 200 of 1,200 interested parties were domiciled in the Netherlands. See also H. Verhagen and J. Kuipers, “De erkenning van een Engelse scheme of arrangement door de Nederlandse rechter”, in N. Faber et al. (eds), *Overeenkomsten en Insolventie* (2012, Kluwer, Deventer), at 352 et seq.

scheme of arrangement is that the relevant home jurisdiction did not provide for adequate similar restructuring tools. In the legal (restructuring) practice, the rather cooperative approach that the English courts have taken in accepting jurisdiction has therefore been welcomed and that approach has made several successful restructurings possible for companies that otherwise would have had to apply for the opening of insolvency proceedings.

80 As we have seen, several European countries have now introduced similar hybrid restructuring tools or are in the process of doing so. The European Commission in its Recommendation has also recommended that all Member States introduce a hybrid restructuring tool outside of formal insolvency proceedings. Thus, in the future there may be less need for non-UK companies to seek the assistance of the English courts and consequently, the English courts may not need to stretch their jurisdiction as far as they have done thus far.

81 After all, even the English courts themselves are conscious of the fact that they may have been pushing the envelope in the recent schemes that were sanctioned. As Hildyard J put this rather fittingly in his judgment in *Re Apcoa Parking* [2014] EWHC 3849 (Ch), at paragraph 206:

“I have been very conscious that these Schemes do test the boundaries of a jurisdiction which is by its nature potentially exorbitant. It is important, both in terms of propriety and to safeguard a salutary and useful jurisdiction to take care in its application.”

[this page is intentionally left blank]